DOMENICO TUSSIO ET UX.

IBLA 75-564 Decided March 8, 1976

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting application NM 24227 for an amendment of Patent No. 1076700.

Affirmed.

1. Applications and Entries: Amendments -- Patents of Public Lands: Amendments

An application for the amendment of a patent is properly rejected where the record contains insufficient evidence to show that the entryman entered lands not intended by him as his entry, and where the record fails to show what precaution to avoid error was taken by the entryman at the time of making the original entry, if in fact he intended to enter other lands.

APPEARANCES: Stanley P. Zuris, Esq., Albuquerque, New Mexico, for the appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Domenico and Malyle Tussio have appealed from a decision of the New Mexico State Office, Bureau of Land Management, dated April 29, 1975, rejecting their application (NM 24227) for the amendment of Patent No. 1076700. The relevant facts are as follows:

On December 27, 1929, one Robert L. Perks filed an application for an original stock-raising homestead entry for the E 1/2 sec. 20, T. 9 N., R. 9 W., N.M.P.M., containing 320 acres (SF 060554). On January 25, 1930, Perks filed an application for an additional

stock-raising homestead for the E 1/2 sec. 8, T. 9 N., R. 9 W., N.M.P.M., containing 320 acres (SF 060848). The lands applied for in both applications were described in conformance with the official survey of record which was approved on November 5, 1881.

On March 13, 1930, entryman Perks was informed that application SF 060848 (embracing the E 1/2 sec. 8) was being held for rejection because the W 1/2 section 20 was vacant and therefore his application violated the rule of compactness. Perks was given 30 days in which to file either a supplemental application for the W 1/2 of section 20, or to submit an affidavit, corroborated by at least two witnesses, showing that the W 1/2 of section 20 was not suitable for stock-raising purposes. Subsequent thereto, the entryman submitted the following affidavit:

> I, Robert L. Perks, having made Hd. E. of the east half of section 20 and additional east half of section 8, both in township 9 N. R. W. N.M. P.M., desire to state that the west half of those said sections are all solid lava and of no account for agriculture or stock raising purposes.

The register revoked his rejection of the additional homestead application SF 060848, but by letter of April 15, 1930, suspended the application because, inter alia, the entryman had not filed a petition for the designation of the land as suitable for stock-raising. On August 5, 1930, Perks filed the petition for designation. After appropriate designation, the entry was allowed September 9, 1931.

On October 22, 1934, Perks submitted his final proof. It was suspended on October 25, 1934, because of the failure of one of his witnesses to complete the witness form. On November 3, 1934, the witness supplied the required information and final certificate issued on December 14, 1934. Patent No. 1076700 for the subject land, E 1/2 sec. 8, E 1/2 sec. 20, T. 9 N., R. 9 W., issued on July 12, 1935.

Appellants acquired title to the E 1/2 sec. 8 on December 15, 1959, from the entryman's successors-in-interest. On October 1, 1971, as a result of various conflicts relating to a proposed transcontinental telephone cable right-of-way, the District Manager of the Albuquerque District, BLM, requested an official determination of the boundary location of the W 1/2 sec. 8, T. 9 N., R. 9 W. On May 1, 1972, the final returns of the dependent resurvey of the boundaries of section 8 were transmitted to the Director, BLM, for

acceptance and approval. Appellants have filed a protest of this survey, contending that it has effectively deprived them of access to their land from State Highway 117. We wish to point out that the appellants' protest of the survey is not presently before this Board. We do not, in any way, pass on its correctness or lack thereof.

On December 17, 1974, the appellants filed application NM 24227, seeking "amendment, modification or correction" of Patent No. 1076700. In their application appellants allege that "a mistake occurred at the time of original entry in identifying the lands actually entered and selected as being the east one-half instead of the west one-half of said Section 8 * * *." Appellants admit that they are uncertain as to how such a mistake occurred but "believe that all of the normal precautions were taken prior to the filing of the erroneous entry * * * including verification of the entryman's occupancy, cultivation and improvements by employees of the United States Land Office and believe that the mistake may have arisen from reliance by all persons involved upon the original map and survey prepared by the Taylor & Powel Survey of 1881."

[1] In order to successfully seek an amendatory patent, appellants must show two separate things. First, they must show that the lands described in the patent were not those which the entryman intended to enter. See, e.g., H. L. Bigler, 11 IBLA 297 (1973); Frank H. Stefflre, 3 IBLA 255 (1971). Second, and equally important, the applicants must show what precautions were taken prior to the description to avoid the error complained of. The applicable regulation, 43 CFR 1821.6-3(a), requires that "[t]he showing in this regard must be complete, because no amendment will be allowed unless it appears that proper precaution was taken to avoid error at the time of selection."

As regards the first requirement certain observations are in order. Appellants have submitted an affidavit of one Robert L. Roberts, Jr., the brother-in-law of the entryman. The Roberts affidavit states that his parents acquired title to the land described as the E 1/2 of section 8 by deed from Grace Perks, the former wife of the entryman, and from the grantees of the entryman. Affiant further states that he, together with his father and the entryman, improved lands which they believed to be in the E 1/2 of the section but which are placed by the dependent resurvey in the W 1/2 of the section.

Appellants also submitted photographs which were identified by Roberts as showing variously the house where he lived as well as other structures which, it is alleged, are now situated in the W 1/2 of the section in the dependent resurvey.

Further, appellants point to the field examination report of the District Office to the State Director. In the report, dated March 13, 1975, the District Manager noted that the field examiners "are of the opinion that it would be hard to dispute that the additional homestead was intended to be filed on lands that could be cultivated and improvements placed on. The E 1/2 of section 8 consists of cliffs and high mesa tops that have no physical means of access, are too rough and inaccessible for any cultivation. Improvements are definitely on the E 1/2 W 1/2 of section 8." (Emphasis supplied.)

The report of the field examiners, however, is contradicted by the report of the surveyors conducting the dependent resurvey who, in their general description of the land, stated:

> Section 8 in Township 9 North, Range 9 West consists of slightly rolling land to high mesas on the east half and mostly contained by a lava flow on the west. The section is covered with a moderate to scattered growth of pinon and cedar. The drainage is generally south.
> * * *
> The area is used mainly for grazing cattle.

(Emphasis supplied.)

It seems clear that the field examiners conducted their examination with a view towards determining whether or not the land was suitable for the cultivation of crops. Thus, the report declared that the field examiners did not feel that the lands were susceptible of cultivation. Perks' entry, however, was for stock-raising purposes. Section 2 of the Act of December 29, 1916, 39 Stat. 862, as amended, 43 U.S.C. § 292 (1970), provides that the Secretary of the Interior may designate lands as stock-raising lands which are "chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, [and] are not susceptible of irrigation from any known source of water supply * * *." 1/

1/ The Roberts' affidavit states that irrigation ditches were constructed in the W 1/2 of section 8 to utilize rain run-off.

Similarly, we agree with the State Office determination that Perks' home was constructed on the E 1/2 of section 20, and not on the E 1/2 of section 8. A number of factors impel this conclusion. First, entry SF 060554 on the E 1/2 of section 20 was the original stock-raising homestead entry, while the entry on the E 1/2 of section 8 was the additional entry. It seems eminently probable that the original entry would be the situs of the home. Furthermore, during the pendency of the original entry and before the additional entry in E 1/2 section 8 was granted, Perks twice informed the Santa Fe Land Office that he would be absent from the land in section 20 for a short period of time. Indeed, the final proof indicated that the house was constructed in 1930, prior to the allowance of the additional entry. Finally, in his final proof in answer to the question whether [he] claimed residence on his original or additional homestead he answered "on Orininal [sic] Entry."

A close scrutiny of Roberts' affidavit discloses that the structures found in section 8 were not Perks' original residence but were constructed subsequent to his residency on section 20. All that the evidence submitted by appellants can fairly be said to indicate is that Perks may have erroneously located the western boundary of the E 1/2 of section 8. The evidence cannot be said to establish that Perks intended to enter the W 1/2 of the section.

Additionally, we have noted above that in order to qualify for an amendatory patent the party seeking the amendment must show what precautions were taken prior to the description to avoid the error complained of. The appellants have submitted no such showing.

The Department has recognized that it is often difficult for subsequent grantees to show what safeguards their predecessors-in-interest took to avoid error in the description of lands which they desired to enter. See Hudson Investment Co., 17 IBLA 146, 165 n.8, 81 I.D. 533, 542 n.8 (1974); Faydrex, Inc., 14 IBLA 195 (1974); Elizabeth B. Poncia, A-28982 (August 17, 1962). But, as this Board noted in Hudson Investment Co., supra, "[t]his difficulty does not obviate the necessity of compliance in any way." It is necessary to reject appellants' application for this reason alone.

We wish to reiterate that nothing in this decision is intended to reflect, in any way, on the correctness or incorrectness of the dependent resurvey.

Appellant has requested that the case be assigned to the Hearings Division for a fact-finding hearing before an Administrative Law Judge. In view of the conclusions reached herein, the request is denied, 43 CFR 4.415.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons given.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Frederick Fishman
Administrative Judge